

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. BECKWITH,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

Case No. C04-1488-MJP-JPD

REPORT AND RECOMMENDATION

Plaintiff Michael Beckwith proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (the “Commissioner”). The Commissioner denied Plaintiff’s application for supplemental security income (“SSI”) and disability insurance benefits (“DIB”) under Titles II and XVI of the Social Security Act after a hearing before an Administrative Law Judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be reversed and remanded for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 45-year-old man with a high school education and four years of service in the United States Air Force. AR 63, 104, 75. Following his discharge from the Air Force, the plaintiff successfully completed vocational training at Tacoma Community College. AR 111. Plaintiff has held a variety of jobs, including apartment manager, phone-room manager, cashier,

01 baker, and security guard. AR 111, 118, 75.

02 In 1981, plaintiff molested his young niece and was sentenced to a period of
03 approximately four years of imprisonment. AR 401. After opting out of treatment at Western
04 State Hospital, plaintiff was incarcerated for the remainder of his sentence. AR 401. In 1999,
05 he pleaded guilty to possession of child pornography and served approximately twenty months
06 in prison. AR 401-02.

07 Alleging “affective” and “personality” disorders, plaintiff filed for SSI in November
08 2000. AR 385-88. In December 2000, he applied for DIB, alleging disability beginning on
09 March 31, 1998. AR 63. The Commissioner denied plaintiff’s applications initially, and on
10 reconsideration in 2001. AR 32-39. Following a hearing, the ALJ determined that plaintiff was
11 not disabled. AR 23-24. She found that he was capable of performing simple, repetitive tasks
12 that did not involve the public and denied his applications for benefits. AR 23-25. The Appeals
13 Council denied plaintiff’s request for review on May 7, 2004. AR 5. The ALJ’s decision
14 therefore became the final decision of the Commissioner for purposes of this Court’s review.
15 Plaintiff timely brought this civil action challenging the Commissioner’s final decision. Dkt.
16 No. 3.

17 II. JURISDICTION

18 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C.
19 §§ 405(g), 1383(c)(3).

20 III. STANDARD OF REVIEW

21 The Court may set aside the Commissioner’s denial of social security benefits when the
22 ALJ’s findings are based on legal error or not supported by substantial evidence in the record as
23 a whole. *See* 42 U.S.C. §§ 405(g), and 1383(c)(3); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th
24 Cir. 1993); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is
25 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence
26 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,

01 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility,
02 resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53
03 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational
04 interpretation, it is the Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*,
05 278 F.3d 947, 954 (9th Cir. 2002).

06 The Court has discretion to remand for further proceedings or to award benefits. *See*
07 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of
08 benefits where "the record has been fully developed and further administrative proceedings
09 would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.
10 2002).

11 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
12 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
13 must be resolved before a determination of disability can be made; and (3) it is clear
from the record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

14 *Id.* at 1076-77.

15 IV. EVALUATING DISABILITY

16 The claimant bears the burden of proving that he is disabled within the meaning of the
17 Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is
18 defined as the "inability to engage in any substantial gainful activity by reason of any medically
19 determinable physical or mental impairment, which can be expected to result in death, or which
20 has lasted or can be expected to last for a continuous period of not less than twelve months[.]"
21 42 U.S.C. § 423 (d)(1)(A). A claimant is disabled only if his impairments are of such severity
22 that he is not only unable to do his previous work, but cannot, considering his age, education,
23 and work experience, engage in any other substantial gainful activity existing in the national
24 economy. *See* 42 U.S.C. §§ 423(d)(2)(A), 1382(c)(a)(3)(B); *See also Tacket v. Apfel*, 180
25 F.3d 1094, 1098 (9th Cir. 1999).

26 The Social Security regulations set out a five-step sequential evaluation process for

01 determining whether a claimant is disabled within the meaning of the Social Security Act. *See*
02 20 C.F.R. §§ 404.1520, 416.920. At step one, the claimant must establish that he or she is not
03 engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the
04 claimant establishes that he has not engaged in any substantial gainful activity, the
05 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
06 or more medically-severe impairments or combination of impairments that limit their physical
07 or mental ability to do basic work activities. If the claimant does not have such impairments,
08 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
09 impairment, the Commissioner moves to step three to determine whether the impairment meets
10 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
11 416.920(d). A claimant who meets one of the listings for the required twelve-month duration
12 requirement is disabled. *Id.*

13 When the claimant's impairment neither meets nor equals one of the impairments listed
14 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
15 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
16 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
17 to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to
18 perform past relevant work, the burden shifts to the Commissioner at step five to show that the
19 claimant can perform some other work that exists in significant numbers in the national
20 economy, taking into consideration the claimant's RFC, age, education, and work experience.
21 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds
22 the claimant is unable to perform other work, then the claimant is found disabled and benefits
23 may be awarded.

24 V. DECISION BELOW

25 In her decision of January 30, 2003, the ALJ found that although the plaintiff satisfied
26 the first two disability steps, his impairment did not equal or exceed a listing at step three. She

01 further found that while he could not return to his former jobs, he retained an RFC of being
 02 able to perform simple, repetitive tasks that did not involve the public or children. Because she
 03 concluded that there were jobs in the economy that a person with his RFC could perform, the
 04 ALJ found that the plaintiff was not disabled. Specific findings included the following:

- 05 3. The claimant has an impairment or a combination of impairments
 06 considered "severe" based on the requirements in the Regulations 20
 C.F.R. §§ 404.1520 and 416.920(b).
- 07 4. These medically determinable impairments do not meet or medically
 08 equal one of the listed impairments in Appendix 1, Subpart P,
 Regulation No. 4.
- 09 5. [T]he claimant's allegations regarding his limitations are not totally
 10 credible.
 11
- 12 7. The claimant has the following residual functional capacity: the claimant
 13 can perform simple, repetitive tasks that do not involve working with
 the public or children.
- 14 8. The claimant is unable to perform any of his past relevant work (20
 C.F.R. §§ 404.1565 and 416.965).
 15
- 16 12. The claimant has no exertional limitations (20 C.F.R. §§ 404.1545 and
 17 416. 945).
- 18 13. Considering the range of work at all levels that the claimant is still
 19 functionally capable of performing, in combination with his age,
 education, and work experience, and using section 204.00 of the
 Medical-Vocational Guidelines as a framework for decision-making, the
 20 claimant is not disabled.
- 21 14. The claimant was not under a "disability," as defined in the Social
 Security Act, at any time through the date of this decision (20 C.F.R. §§
 404.1520(f) and 416.920(f)).

22 AR 24-25.

23 VI. ISSUES ON APPEAL

24 Although the plaintiff raises a number of complaints about the decision below, it
 25 appears that the primary issues on appeal are:

1. Did the ALJ err by failing to properly evaluate medical evidence?
2. Did the ALJ err by failing to properly evaluate evidence from the plaintiff and his mother in making her RFC determinations?
3. Did the ALJ err by failing to call a Vocational Expert (“VE”) at step five of the disability evaluation process?

VII. DISCUSSION

A. The ALJ Failed to Properly Evaluate the Medical Evidence.

Plaintiff argues that he suffered from more limitations than those determined by the ALJ and that the ALJ’s treatment of the medical evidence resulted in an inaccurate assessment of his limitations. Dkt. No. 12. Defendant contends that the ALJ properly evaluated all of the medical evidence. Dkt. No. 20.

Because treating physicians are employed to cure and thus have a greater opportunity to know and observe the patient as an individual, their opinions are given greater weight than the opinions of other physicians. *Rodriguez v. Bowen*, 876 F.2d 759, 761 (9th Cir. 1989). A treating physician’s opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability. *Id.* at 761-62 & n.7. The ALJ may disregard the treating physician’s opinion whether or not that opinion is contradicted. *Magallanes v. Bowen*, 881 F.2d at 751.

Where a treating physician’s opinion is not contradicted by another physician, however, it may be rejected only for “clear and convincing” reasons supported by substantial evidence in the record. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). In order to do so, the ALJ must provide a detailed and thorough summary of the facts and conflicting evidence and explain his interpretations and findings based thereon. *Id.* at 725. Mere conclusions are not enough. *Id.* An ALJ must defer to a treating physician’s opinion, even if controverted by other medical opinions, unless the ALJ provides specific and legitimate reasons based on substantial evidence in the record. *See Andrews*, 53 F.3d at 1041, 1043, *Magallanes*, 881 F.3d at 751. The ALJ can meet this burden by setting out a detailed and thorough summary of the

01 facts and conflicting clinical evidence, stating his interpretation thereof and making findings.”

02 *Id.*

03 1. Dr. Mac’s Diagnosis

04 In this case, Dr. Mac, the plaintiff’s treating psychiatrist, opined that plaintiff had
05 depression that caused marked limitations in his ability to relate appropriately to co-workers
06 and supervisors. AR 185. He also opined that plaintiff had a moderate inability to interact
07 appropriately with the public. AR 185. The ALJ’s decision is generally consistent with these
08 opinions, AR 21, but her RFC analysis implicitly rejects them, because it fails to address his
09 limitations in dealing with the public, coworkers, and supervisors. AR 23-24.

10 Because Dr. Mac’s opinions were uncontradicted, the ALJ was obligated to provide
11 clear and convincing reasons for rejecting them. She failed to do so. Indeed, the decision
12 provides no specific justification for why these limitations were omitted. The ALJ did
13 acknowledge that limiting plaintiff to unskilled work will largely remove him from working
14 with others, but this statement does not address his limitations in dealing with supervisors and
15 co-workers. She also found that the plaintiff’s testimony regarding his limitations to be “not
16 entirely credible,” but this does not sufficiently explain her decision to reject Dr. Mac’s
17 diagnosis. On remand, the ALJ should therefore properly weigh Dr. Mac’s diagnosis, or
18 provide clear and convincing reasons supported by the record for rejecting it.

19 2. Dr. Vizzard’s Diagnosis

20 Dr. Vizzard was also a treating psychiatrist. He opined that plaintiff suffered from
21 severe depression, and added that he suffered from pedophilia and avoidant personality
22 disorder as well. AR 157. He determined that plaintiff’s impairments caused moderate
23 limitations in his ability to relate appropriately to co-workers and supervisors. AR 158. He
24 also opined that plaintiff had a marked inability to interact appropriately with the public. AR
25 158. These opinions are not contradicted by other medical evidence in the record and are
26 generally consistent with Dr. Mac’s opinions. *See supra*, § VII A. 1.

01 Once again, the ALJ's RFC analysis implicitly rejects a treating physician's evaluation
02 by failing to address plaintiff's limitations in dealing with the public, coworkers, and
03 supervisors. AR 23-24. Rather, than integrating or rejecting the opinion, the ALJ merely
04 summarized its contents. AR 16-17. Because the ALJ did not employ the limitations identified
05 by this opinion in her analysis, nor provide clear and convincing reasons for rejecting it, she
06 committed legal error. On remand, the ALJ should therefore properly weigh Dr. Vizzard's
07 testimony or provide clear and convincing reasons for rejecting it.

08 B. Evaluation of Examining Doctors' Testimony

09 The opinions of examining physicians are to be given more weight than non-examining
10 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
11 uncontradicted opinions of examining physicians may not be rejected without clear and
12 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
13 physician only by providing specific and legitimate reasons that are supported by the record.
14 *Id.* at 830-31.

15 1. Psychologist Dr. Chan

16 In October 2000, Dr. Chan evaluated plaintiff and diagnosed him with major
17 depression, pedophilia, and avoidant personality features. AR 246. Among other things, he
18 found plaintiff to have a markedly limited ability to respond appropriately to and tolerate the
19 pressures and expectations of a normal work setting.¹ AR 247. Dr. Chan's opinions are
20 uncontradicted.

21 Here again, however, the ALJ implicitly rejected the opinions without providing
22 sufficient reasons for doing so. She simply mentions Dr. Chan's diagnoses of plaintiff and
23 notes that Dr. Chan's opinion was rendered soon after plaintiff's release from prison. AR 17.
24 However, the ALJ does not address the limitations identified by Dr. Chan or otherwise include

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26 ¹Dr. Chan observed that medication improved his ability to function, but nevertheless
assessed the marked limitations described above.

01 his medical evidence in her analysis. On remand, she should properly weigh Dr. Chan's
02 testimony or provide clear and convincing reasons for not weighing it.

03 2. Psychiatrist Dr. Hoiness

04 Dr. Hoiness found plaintiff to have a GAF of 50, which indicates a "serious impairment
05 in social, occupation or school functioning." AR 266; Amer. Psychiatric Ass'n, *Diagnostic*
06 *and Statistical Manual of Mental Disorders* 32 (4th Ed. 2000). Dr. Hoiness also offered an
07 uncontradicted medical opinion that plaintiff would "have difficulty interacting with coworkers,
08 the public and supervisors." AR 266. The ALJ's RFC analysis did not adequately incorporate
09 this limitation. She found that plaintiff could perform simple, repetitive tasks that do not
10 involve working with the public or children. AR 22. This does not address his ability to work
11 with supervisors and coworkers. On remand, the ALJ should therefore properly weigh Dr.
12 Hoiness's testimony, or provide clear and convincing reasons for rejecting it.

13 3. Psychologist Dr. Hammer

14 In September 2002, Dr. Hammer examined plaintiff and determined that he had poor or
15 no ability to relate to coworkers, interact with supervisors, deal with work stressors, or use
16 proper judgment. AR 371. He similarly opined that plaintiff had no or poor ability to behave
17 in an emotionally stable manner, relate predictably in social situations, and work reliably.
18 AR 372.

19 Unlike the opinions of Drs. Chan and Hoiness, however, the ALJ gave clear and
20 convincing reasons for rejecting at least portions of Dr. Hammer's opinion. The ALJ pointed
21 out that plaintiff's activities of daily living were inconsistent with the extreme limitations Dr.
22 Hammer described. AR 21. She noted that he could take care of all of his personal needs,
23 engage in volunteer work, and perform in certain social situations. AR 21. She also noted that
24 evidence suggested plaintiff did puzzles and certain other activities that required concentration.
25 AR 21. These are sufficiently clear and convincing to reject the portions of Dr. Hammer's
26 testimony relating to plaintiff's ability to function in some social situations, but they fall short

01 of addressing plaintiff's limitations with respect to his ability to relate to others and perform in
02 a work environment. This should be corrected on remand.

03 C. Evaluation of Non-Examining Doctors' Testimony

04 Plaintiff also argues that the ALJ erred by failing to properly consider a wide range of
05 opinions offered by various non-examining state agencies. Dkt. No. 12. Defendant does not
06 respond to this argument.

07 Opinions from non-examining medical sources are to be given less weight than treating
08 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
09 opinion of such a source and may not simply ignore them. In other words, an ALJ must
10 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p
11 1996 WL 374180, at *2 (S.S.A.).

12 Here, at least three different psychologists evaluated plaintiff and found him to have a
13 moderate limitation on his ability to concentrate for extended periods of time and to interact
14 appropriately with co-workers and the public. AR 197-98; 223-24; 281-83; 323-25. The ALJ,
15 however, provided no discussion of these opinions and, at least with respect to his ability to
16 work with co-workers and supervisors, does not appear to have incorporated them into her
17 analysis. This error should be corrected upon remand.

18 D. Analysis of Plaintiff's Credibility

19 Plaintiff argues that the ALJ failed to provide "clear and convincing" reasons for not
20 finding him credible. Dkt. No. 12. He argues that the ALJ exaggerated his ability to perform
21 minimal activities and improperly weighed reports that his condition had improved. Dkt. No.
22 12.

23 According to the Commissioner's regulations, a determination of whether to accept a
24 claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§ 404.1529
25 and 416.909; SSR 96-7p, 1996 WL 374186, *2 (S.S.A.). First, the ALJ must determine
26 whether there is a medically determinable impairment that could reasonably be expected to

01 cause the claimant's symptoms. SSR 96-7p, at *2. Next, the ALJ must evaluate the intensity
02 and persistence of the claimant's symptoms, using seven factors laid out in SSR 96-7p.² *Id.* at
03 *2. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not
04 discredit the claimant's testimony as to the severity of symptoms merely because they are
05 unsupported by objective medical evidence. *Reddick*, 157 F.3d at 722 (internal citations
06 omitted) (en banc). Absent affirmative evidence showing that the claimant is malingering, the
07 ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Id.* In
08 presenting these reasons, the ALJ must specifically identify what testimony is not credible and
09 what evidence undermines the claimant's complaints; general findings are insufficient. *Id.*

10 Here, there are no allegations that plaintiff was malingering, so the ALJ was required to
11 provide clear and convincing reasons for rejecting his testimony. The ALJ, however, failed to
12 meet this burden. The ALJ determined plaintiff to "be not entirely credible" because she
13 believed that his church attendance was inconsistent with his inability to function around
14 people, but these two are not necessarily mutually exclusive. AR 22. The fact that plaintiff can
15 attend an occasional church service does not mean he is capable of consistently performing in a
16 stressful and structured work environment. 20 C.F.R. § 404, Subpt. P., App. 2, § 200.00(c)
17 (defining RFC as "the maximum degree to which the individual retains the capacity for
18 *sustained* . . . [work].") (emphasis added). Moreover, the ALJ pointed out that he said he had
19 not done puzzles in several years, but was reported to have done one in the year 2000. The
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21 ²SSR 96-7p lists at least seven factors that an adjudicator must consider when assessing
22 the credibility of an individual's statements. They include (1) the individual's daily activities;
23 (2) the location, duration, frequency, and intensity of the individual's pain or other symptoms;
24 (3) factors that precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness,
25 and side effects of any medication the individual takes or has taken to alleviate pain or other
26 symptoms; (5) treatment, other than medication, the individual receives or has received for
relief of pain or other symptoms; (6) any measures other than treatment the individual uses or
has used to relieve pain or other symptoms [. . .]; and (7) any other factors concerning the
individual's functional limitations and restrictions due to pain or other symptoms. SSR 96-7p,
1996 WL 374186, at *3 (S.S.A.).

01 Ninth Circuit has specifically stated that “[o]ccasional symptom-free periods are not
02 inconsistent with disability.” *Lester*, 81 F.3d at 833. AR 22. These reasons offered by the
03 ALJ are insufficient for rejecting plaintiff’s testimony. On remand, the ALJ should be required
04 to properly evaluate plaintiff’s testimony, or to provide clear and convincing reasons for
05 rejecting it.

06 E. Analysis of Lay Witness Testimony

07 Plaintiff also asserts that the ALJ erroneously discredited his mother’s lay witness
08 testimony by failing to give “reasons that are germane” to that witness. Dkt. No. 12.
09 Defendant responds that plaintiff’s mother’s testimony had a low probative value and that the
10 ALJ was not required to address it.

11 In order to determine whether a claimant has an impairment, an ALJ may also consider
12 lay witness sources, such as testimony from family members. 20 C.F.R. § 404.1513(d)(4).
13 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to
14 work is competent evidence, 20 C.F.R. § 404.1513(e), *Sprague v. Bowen*, 812 F.2d 1226,
15 1232 (9th Cir. 1987), and therefore *cannot* be disregarded without comment. *Dodrill v.*
16 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). If an ALJ wishes to discount the testimony of a lay
17 witness, he must provide reasons germane to each witness. *Id.* Identifying inconsistencies
18 between such statements and the record when looked at as a whole is sufficient. *Lewis v.*
19 *Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001).

20 Here, it is not clear that the ALJ actually rejected plaintiff’s mother’s testimony.
21 Plaintiff’s mother reported that plaintiff is depressed, has few friends, and that he works very
22 slowly. The ALJ briefly summarized the mother’s statements, but made no indication about
23 whether she adopted or rejected them. AR 20-21, 435-39. While the ALJ’s findings that
24 plaintiff had moderate limits in social functioning and difficulty dealing with the public are
25 consistent with this testimony, the ALJ does not explicitly address the testimony. On remand,
26 the ALJ should directly address the weight she gives to this testimony.

01 F. The ALJ Should Have Called A Vocational Expert at Step Five

02 Plaintiff argues that the ALJ erred by failing to call a vocational expert (“VE”) at step
03 five of the sequential evaluation process. Dkt. No. 12. Specifically, he argues that VE
04 testimony was needed (1) because the ALJ found him to suffer from a severe mental
05 impairment at step two; (2) to determine the vocational impact of plaintiff’s “moderate”
06 difficulties maintaining concentration, persistence, or pace; (3) to determine whether there was
07 a significant number of jobs that he was qualified to perform; and (4) to evaluate the extent of
08 his mental limitations. Dkt. No. 12. Defendant responds that the ALJ was not required to call
09 a VE because she properly found him capable of performing unskilled work. Dkt. No. 20.

10 After a claimant has demonstrated that he has a severe impairment that prevents him
11 from doing their past relevant work, he has made a *prima facie* showing of disability. *Tacket*,
12 180 F.3d at 1100. The burden then shifts to the Commissioner at step five to demonstrate that,
13 in light of the claimant’s RFC, age, education, and work experience, he can perform other
14 types of work that exist in “significant numbers” in the national economy. *Id.*; 20 C.F.R.
15 §§ 404.1520(f) and 416.920(f).

16 The Medical-Vocational Guidelines (“Guidelines”) are essentially a matrix that
17 categorizes work by exertional level (sedentary, light, or medium) and contain various factors
18 relevant to a claimant’s ability to find work, including age, education, and work experience.
19 For each combination of factors, the Guidelines direct a finding of either “disabled” or “not
20 disabled.” An ALJ may rely upon the Guidelines to direct a finding when they “*completely and*
21 *accurately* represent the claimant’s limitations.” *Tacket*, 180 F.3d at 1101 (emphasis in
22 original).

23 When a plaintiff suffers from significant non-exertional impairments not contemplated
24 by the Guidelines, however, the ALJ may not use them to direct a finding of disability and
25 instead must use the principles in the appropriate sections of the regulations to determine
26 whether plaintiff is disabled. SSR 85-15, 1985 WL 56857, at *1 (S.S.A.); *Tacket*, 180 F.3d at

1101-02. When an ALJ uses the Guidelines in this fashion to evaluate non-exertional limitations not contemplated by the Guidelines, she must call upon a VE. *Tacket*, 180 F.3d at 1102. In such a scenario, the ALJ must provide the VE with an accurate and detailed description of the claimant's impairments, as reflected by the medical evidence of record.³ *Tacket*, 180 F.3d at 1101.

Here, the ALJ erred by failing to call a VE at step five after finding plaintiff suffered from severe non-exertional impairments at step two. At step two, the ALJ found plaintiff to suffer from severe non-exertional impairments, including pedophilia and depression. AR 21, 24. She also found that he had "difficulty" being in situations with the public and determined that he had at least "moderate" difficulty maintaining concentration, persistence, or pace, as well as difficulty concentrating. AR 21. She found him to suffer from no exertional physical limitations. AR 21. Since his severe impairments were purely non-exertional, the ALJ should have called a VE to determine what work he was capable of performing. The ALJ did not call a VE at step five. Rather, she appears to have discounted the effects of plaintiff's severe impairments and instead used the Guidelines to make her own determination that he was not disabled.

The ALJ's failure to call a VE constituted legal error. *See Tacket*, 180 F.3d at 1102. This requires reversal. On remand, ALJ should require the VE to provide testimony concerning the full vocational impact of all plaintiff's impairments, including his difficulties maintaining concentration, persistence or pace. The VE should also testify as to the availability of jobs in the economy for which plaintiff is qualified.

VIII. CONCLUSION

³Using the VE, the ALJ must determine whether plaintiff is capable of his past relevant work and if not whether his relevant work skills are transferable to other jobs. If they are not transferable, the ALJ must then determine whether the plaintiff is capable of performing any unskilled work. SSR 85-15.

01 For the reasons set forth above, the decision of the ALJ should be reversed and this
02 case remanded for further administrative hearings. On remand, the ALJ should be instructed to
03 conduct her proceedings in a manner not inconsistent with this Report and Recommendation.

04 DATED this 1st day of July, 2005.

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07 JAMES P. DONOHUE
08 United States Magistrate Judge
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